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No. 96-74

In The
Supreme Court of the United States
October Term, 1995

CHAIM SCHACHNER, individually, and as representative of all similarly situated persons
Respondent,

v.

BLUE CROSS & BLUE SHIELD OF OHIO AND MUTUAL HEALTH SERVICES COMPANY
Petitioners.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

May a District Court grant a motion for summary judgment against a plan participant or beneficiary suing for benefits under a health insurance plan subject to ERISA, based upon extrinsic evidence submitted by one party to create an ambiguity in an otherwise unambiguous plan document.

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STATEMENT OF THE CASE

This case involves a simple and direct issue: whether the District Court may use extrinsic evidence to create an ambiguity in a plan document which is otherwise unambiguous. Existing ERISA precedent does not allow such use of extrinsic evidence. The District Court did so, in violation of this well-established rule, and the Court of Appeals accordingly reversed and remanded the District Court's decision.

I. THE ERISA PLAN DOCUMENT.

At issue in the case is the Petitioners'[1] refusal to provide coverage for Phase II Cardiac Rehabilitation Services ("Cardiac Rehab"). The terms of Respondent's insurance are detailed in the "High Level Certificate" drafted by Petitioners, which provides (R 1, Ex. A, at p. 2):[2]

> **Benefits**
> This section explains each **type** of health care benefit in your coverage. **It tells you what services are covered**. (Emphasis added.)

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[1] Petitioners include Blue Cross Blue Shield of Ohio and Mutual Health Services Company. They are referred to herein as either "Petitioners" or "Blue Cross."

[2] The Certificate is also contained in the Appendix (at Apdx. O-146) to the Petitioners' Brief. Where possible, reference to that Appendix will appear in this Brief (as "Apdx. at ___").

The Benefits section is followed by "Exclusions," which "lists what is not covered" (*Id.* at p. 12). Subject to exclusions, therefore, services listed under "Benefits" are covered services. **Cardiac Rehab is not listed as an exclusion. See**, Stipulations of Fact (Apdx. O-143; R 114) at #9.

Included in the "types" of "Health Care Benefits" described in the Certificate (beginning at p. 5) are "Therapy Services," which are described this way:

> **Therapy Services**
> Services or supplies used to promote recovery from an illness or injury **include**:
>
> * * *
>
> Treatment by Physical Means - The treatment given to relieve pain, restore maximum function and to prevent disability following disease, injury or loss of a body part. Such services **include** physical treatments...and neurophysiological principles and devices.
>
> * * *

As demonstrated below, and found by the Sixth Circuit, Cardiac Rehab services squarely fit the definition of "Treatment by Physical Means."

II. CARDIAC REHABILITATION SERVICES.

The evidence submitted to and ignored by the District Court demonstrated that Cardiac Rehab is an

outpatient hospital program in which trained personnel monitor exercise which is designed to significantly improve the ailing patient's cardiovascular condition. The services consist of several different component parts, but primarily center on regular and escalating physical training and exercise performed while being monitored by medical personnel. *See*, Affidavit of Ben Meola, at ¶8 (Apdx. K; R 97, Ex. C).

For most persons, Cardiac Rehab strengthens and improves the heart function and circulatory system, enabling the patient to recover more quickly from cardiac incidents (e.g. heart attacks). It relieves pain, restores maximum function and prevents future disability by preventing future cardiac incidents. (R 97, Ex. I at ¶3-4) Accordingly, the person denied Cardiac Rehab is likely to have a slower recovery, experience more pain and discomfort, and faces an increased likelihood of fatal cardiac incidents in the future.

Blue Cross internally recognized that the purpose of formal outpatient Cardiac Rehab "is to restore individuals to their optimum functional status..." and noted the significant benefits of Cardiac Rehab, which include **reduced mortality** following cardiac events. **See**, memo and attached results by Carol Goebel (B.C. Product Development Analyst) (R 97, Ex. F) at SCHAC 105.

The Certificate explicitly provides that "Therapy Services" and "Treatment by Physical Means," are covered services. Cardiac Rehab clearly falls within the meaning of both. The **uncontroverted** medical evidence submitted to the District Court showed that Cardiac Rehab 1) was "used to promote recovery from illness" (heart disease); and 2) "relieves pain, restores maximum function and

prevents disability." Apdx. A-14. Yet, the District Court granted Blue Cross' Motion for Summary Judgment regarding coverage for these services. In so ruling, the District Court accepted Blue Cross' contention that the parties intended that Cardiac Rehab must be listed separately, by name, as a benefit. Apdx. F-85.

The Court of Appeals described Blue Cross' proposed interpretation of the Plan document this way:

> "BCBSO argues that it considers cardiac rehab to be a covered service only if it is specifically included in the insurance certificate."

Apdx. A-13. This contention was unsupported by any evidence relevant to this plan document. For example, Blue Cross paid for Respondent's "coronary angioplasty", which was **not** specifically listed as a covered service in the plan document. **See**, Stipulations (Apdx. O-144-145; R 114) at ##15, 18, Apdx. F-78-79. Nor did the express language of the plan suggest that Cardiac Rehab, or any other "Therapy Service," had to be specifically listed. As the Court of Appeals found:

> The certificate *** goes on to list the following examples of treatments by physical means, stating: "Such services include physical treatments, *** and neurophysiological principles and devices." The language of that sentence--specifically, "such services include"--indicates that this list is not exclusive, but rather is intended to illustrate some of the services that fall within the definition of "Treatment by Physical Means." Indeed, if the parties intended the

> list to be exclusive, there would have been no need to define the phrase at all.

Apdx. A-12. The Sixth Circuit specifically found that Blue Cross had not suggested a reasonable reading of the plan language. It concluded that "[o]nly Schachner has drawn a plausible interpretation of Treatment by Physical Means from the text of the certificate. Therefore, we hold that the meaning of that phrase is unambiguous, and that it should be interpreted as it is defined in the certificate." *Id.* at A 13.

Because the Court of Appeals found that the parties had suggested only one reasonable interpretation of the plan language, it determined that the plan was not ambiguous as a matter of law. In the absence of an ambiguity, the Court ruled that consideration of extrinsic evidence to **create** an ambiguity was improper. As set forth below, this holding was consistent with existing law in all Circuits.

ARGUMENT

I. THE DECISION OF THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH THE HOLDINGS OF THE OTHER CIRCUITS.

The essence of the Petitioners' position is that Certiorari should be granted to address a split in the Circuits. Petitioners contend that other Circuits[3] allow

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[3] Particularly the First, Third, Seventh, Eighth and Ninth Circuits.

consideration of extrinsic evidence to demonstrate the existence of an ambiguity, while the Sixth Circuit does not. Blue Cross attempts to support its claim of a "split" by relying upon selected quotes taken from a variety of decisions among the Circuits. However, such quotes do not constitute holdings. To ascertain the actual state of the law, the facts and results of each case must be examined. Such an examination demonstrates that no Circuit allows consideration of extrinsic evidence to vary the terms of a document with neither a "latent" nor "patent" ambiguity, and that the decision in the lower court was consistent with the rule applied by all other Circuits.

The foundation of the lower Court's decision rests upon the determination that Blue Cross' proposed interpretation of the plan document was not "plausible". The Court of Appeals found that no ambiguity exists absent two reasonable interpretations; and that extrinsic evidence was improperly considered absent an ambiguity. This holding was entirely consistent with the holdings of all other Circuits.

A. The Sixth Circuit Analysis of Ambiguity.

Petitioners contend that extrinsic evidence should have been considered in determining the existence of ambiguity. The appeals court ruled that "a court cannot make such a determination [of ambiguity] **unless the parties present it with two plausible interpretations of the contract language**." Apdx. A-11-12. Absent the submission of two reasonable interpretations of the plan language, the court found that there was no "ambiguity" in an ERISA plan document, and that, therefore, no extrinsic evidence could be considered:

> Contract language is ambiguous if it is subject to two reasonable interpretations. *** If a court determines that a contract provision is ambiguous, *then* it "may use traditional methods of contract interpretation to resolve the ambiguity, including drawing inferences and presumptions and introducing extrinsic evidence.
>
> Courts may not, however, use extrinsic evidence to create an ambiguity. Rather, the ambiguity must be patent; that is, apparent on the face of the contract. In *Local 783, Allied Industrial Workers v. General Electric Co.*, 471 F.2d 751 (6th Cir.), *cert. denied*, 414 U.S. 822 (1973), we wrote that "[o]nly when the court has determined that the contract is ambiguous is a construction of the clause necessary. After a finding of ambiguity has been made, '[extrinsic evidence] is admissible to aid in its interpretation.'" *** Thus, in this circuit, before a district court can consider extrinsic evidence of the parties' intent, it must find an ambiguity on the face of the contract.

Apdx. A-78.

Respondent contended that the Plan language meant exactly what it said, that coverage was provided for "the treatment given to relieve pain, restore maximum function and prevent disability following disease, injury or loss of a body part." The support for Respondent's interpretation was the express language of the Plan document. The interpretation submitted by Blue Cross

was that Cardiac Rehab, even if it fit the description (i.e., that it was given to relieve pain, etc.), was covered only if specifically listed by name in the Plan document.

The express language of the Plan document did not support Blue Cross' interpretation. In fact, it contradicted it. Blue Cross concluded that **only** listed services were covered; but its Certificate's promise of coverage used the word "include." As found by the Appellate Court, the language used "indicates that this list is **not** exclusive." Apdx. A-12 (emphasis added).

It was clear that the language of the document did not support Blue Cross' suggested interpretation; in fact their position was **contrary** to the express Plan language. Blue Cross attempted to support its contrary interpretation of the Plan language with extrinsic evidence, *i.e.*, other insurance certificates, between it and other insureds, which specifically include Cardiac Rehab as a "covered service." The Court did not permit this attempt.

> As we have explained, however, BCBSO must make its showing of ambiguity *without* resorting to extrinsic evidence. If the contract provision is not ambiguous on its face, the court must enforce it as written.
>
> In *Serrano* [*v. J&L Steel*, 790 F.2d 1279 (6th Cir. 1986)], we rejected the plaintiff's attempt to rely on extrinsic evidence to create an ambiguity in an agreement which we found to be patently unambiguous. 790 F.2d at 1288-89. We will not allow BCBSO to attempt the same maneuver here. Only Schachner has drawn a plausible interpretation of "Treatment by Physical

Means" from the text of the certificate. Therefore, we hold that the meaning of that phrase is unambiguous, and that it should be interpreted as it is defined in the certificate.

B. The Sixth Circuit's Standards for Determining the Existence of Ambiguity and the Admissibility of Extrinsic Evidence are Consistent with that Applied by Other Circuits.

The Sixth Circuit's decision rested upon the simple proposition that an ERISA plan cannot be "ambiguous" if, on its face, it is not susceptible of two reasonable interpretations. Blue Cross suggests that the courts of other Circuits (and even the Sixth Circuit itself) have not utilized this standard. In support of its contention, Blue Cross has relied upon a number of cases, some of which draw a distinction between "latent" and "patent" ambiguities.

A "patent" ambiguity is one where the language used is unclear or confusing. A "latent" ambiguity is slightly different. As defined in *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994), a latent defect exists where the language used, although intelligible, admits, on its face, to more than one reasonable interpretation. 39 F. 3d at 760. An example is found in the old English case of *Ruffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). There the contract referred to the ship "Peerless," a term which was not ambiguous on its face. The parties each suggested a different meaning of the term (each believing that it referred to a **different** Peerless). Both explanations fit within a reasonable reading of the contract's language. The contract, therefore, had a "latent"

ambiguity. **See**, *Taylor*, 39 F.3d at 760. In the context of this case, the distinction between "patent" ambiguities and "latent" ambiguities is a distinction without a difference, because the language was neither unintelligible nor susceptible of two different and reasonable interpretations.

The Sixth Circuit did not reject the concept of latent ambiguity. It simply found that concept inapplicable to the facts of this case. The wording of this plan was so clear that there was no room for a latent ambiguity. Blue Cross' proffered interpretation did not demonstrate a latent ambiguity because it was not a reasonable interpretation in the context of the document as a whole. The interpretation suggested by Blue Cross was, in fact, contrary to the express language of the document[4] and, therefore, could not be a reasonable interpretation.

Petitioners incorrectly assert that "these [other] circuits have held that in ERISA cases federal courts must review any evidence submitted by the parties to determine whether there is any latent ambiguity in the interpretation or application of the language in the agreement." Petitioners' Brief at 5. In fact, these courts have held nothing more than that a "latent" defect, **if** it exists, **then** justifies resort to extrinsic evidence.

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[4] As discussed above, the Sixth Circuit found that the use of the word "include," for example, would be inconsistent with Blue Cross' suggestion that any Therapy Service had to be specifically listed. **See**, p. 7-8, *supra*. Indeed, it is fundamental law that extrinsic evidence may not be admitted to **contradict** express terms, even if they are ambiguous.

Blue Cross maintains that the Sixth Circuit erred in prohibiting the district court from considering extrinsic evidence to discover the existence of "latent" ambiguities. The evidence which it relied upon, however, could not reveal a "latent" ambiguity, because even latent ambiguities must appear on the face of the document. While the terminology utilized by the Circuits may be somewhat inconsistent, the actual rules are not. A careful review of the facts and holdings of the cases relied upon by Blue Cross[5] indicates that, in fact, these courts would not have applied a standard different than that applied by the Sixth Circuit to the facts of this case.

1. First Circuit.

The First Circuit's holding in *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 585-6 (1st Cir. 1993), just as the Sixth Circuit's holding below, relies upon the primary finding that the submission of two reasonable interpretations of the language is what determines ambiguity. In that case, the parties disagreed over what the term "vested" meant in a waiver subject to ERISA. The plaintiff suggested that "vested" meant rights established and fixed because he had fulfilled all eligibility

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[5] The "Question Presented" by Petitioners sought a determination of the proper scope of evidence to be considered in interpreting an "agreement subject to ERISA." Blue Cross attempts to create the illusion of a split by referring to dicta in variety of cases, only some of which involved ERISA plan documents. The cases dealing with LMRA or general contract law, for example, have no application in this matter. Respondent will demonstrate that, as to **ERISA** cases, the Circuits are harmonious.

requirements; the defendant suggested that "vested" meant benefits which ERISA requires to vest. 986 F.2d at 586.

The First Circuit, in addressing this issue, found that language in a plan document is ambiguous "if...the terms allow reasonable but differing interpretations of their meaning. **If** the language of the contract is ambiguous, we turn to surrounding circumstances, undisputed extrinsic evidence, to divine the parties' intent." *Id.* (citations omitted) (emphasis added). Thus, the First Circuit, as the Sixth Circuit below, allowed extrinsic evidence only **after** finding that two reasonable interpretations had been submitted.

2. Third Circuit.

In *Taylor v. Continental Group*, 933 F.2d 1227, 1232-35 (3rd Cir. 1991), the Third Circuit addressed the issue of whether the term "successor" included an entity which had purchased only a division of the defendant employer. The plaintiff suggested that it did and the defendant suggested that it did not. Both were reasonable readings of the term "successor." While the existence of ambiguity was not a specific issue reached in that opinion, the court did specifically state that "a term is ambiguous if it is subject to reasonable alternative interpretations." 933 F.2d at 1232. Again, the threshold issue in finding ambiguity is the existence of **reasonable** alternative interpretations. Because those reasonable alternative interpretations were not present in the case below, the holding of the Sixth Circuit is not inconsistent with the standards applied by the Third Circuit.

3. Seventh Circuit.

Nor is the decision of the Seventh Circuit in *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994) inconsistent. As discussed above, that Court found that the "key" to latent ambiguity is that both parties adopt a **reasonable interpretation** of a term, which later turns out to be inconsistent with each other's interpretation. *Id.* at 760. Again, the threshold requirement is that there are at least two **reasonable** interpretations suggested. That did not occur in this matter, and the Sixth Circuit's holding is not, therefore, at odds with the "well established doctrine of latent ambiguity" or the existing case law in the Seventh Circuit.

4. Eighth Circuit.

The Petitioners rely upon two cases in asserting that the Eighth Circuit allows extrinsic evidence to create an ambiguity: *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1353 (8th Cir. 1980), and *Jensen v. Sipco, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994) cert. denied, 115 S.Ct. 1428 (1995). Neither supports this claim.

In *Landro*, there was an issue as to whether the phrase "initial employment" meant the date when an employee first started to work for the current employer, or for the current employer's predecessor. 625 F.2d at 1349. The Eighth Circuit found that the language of the document, without reference to extrinsic evidence, was ambiguous. Only then did it refer to extrinsic evidence. Petitioner's suggestion that the Court utilized extrinsic evidence to establish the existence of an ambiguity, "latent" or otherwise is unsupportable.

Nor was the analysis any different in *Jensen*, where the Court found that the relevant provisions of the contract relied upon by the employer were "not **facially unambiguous**." 38 F.3d at 950. Again, the Court determined that an ambiguity existed **without** reference to extrinsic evidence.

Thus there is no basis to assert that the Eight Circuit utilizes any different rule than the Sixth Circuit in ascertaining whether the Court may consider extrinsic evidence in determining the existence of an ambiguity.

5. Ninth Circuit.

The Petitioners rely upon the case of *Bolton v. Construction Laborers Pension Trust for So. California*, 56 F.3d 1055 (9th Cir. 1995) to support their contention that the Ninth Circuit applies a different standard than applied by the Sixth Circuit in this matter.[6] Again, the Petitioners attempt to mischaracterize this holding. In *Bolton*, the court was examining whether the plan's "break in service" rule applied to only voluntary (and not involuntary) breaks in service.

In *Bolton* the court may have used a different terminology, but its holding was essentially the same. As defined by the quoted passage, the term "latent ambiguity" does not refer to an ambiguity which is made apparent through reference to extrinsic evidence. Rather, it refers to a situation where simple logic and the language of the

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[6] Specifically, Petitioners suggest that the relevant portion of this opinion is found at page 1059, note 2. This was not, obviously, part of the Court's holding, nor a pivotal issue in the case.

plan itself create the possibility that there may be more than one reasonable reading of the contract terms. The Ninth Circuit in no way suggested that resort should have been made to extrinsic evidence in order to **create** an ambiguity, rather than to resolve it.

6. The Sixth Circuit's Own Case Law.

Petitioners also suggest that the Sixth Circuit's holding herein was inconsistent with its own previous holding in the case of *U.A.W. v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), cert. denied, 465 U.S. 1007 (1984). Yet, upon examination, the holding below was entirely consistent with *Yard-Man* and other relevant Sixth Circuit Authority.

In *Yard-Man*, as in all of the cases reviewed herein, both parties submitted reasonable interpretations of the agreement drawn from the language of the contract itself. The court stated, at p. 1480:

> The language "will provide insurance benefits equal to the active group" could **reasonably** be construed, as a reference to the nature of retiree benefits **or** as an incorporation of some durational limitation as well.

(Emphasis added.)

Because the prerequisite of reasonable alternative readings was met, the consideration of extrinsic evidence to **resolve** the ambiguity, rather than to **create** it was appropriate. That holding is entirely consistent with the Court's holding in this matter, where the evidence was

excluded because there was no ambiguity to resolve. Petitioner's suggestion that the Sixth Circuit has failed to follow its own precedent is, therefore, wholly unsupported.

C. The Holding of the Sixth Circuit was Consistent with Existing Case Law.

The Sixth Circuit determined that use of extrinsic evidence is improper to create an ambiguity in an otherwise unambiguous document. As demonstrated above, each of the Circuits which Blue Cross contends have holdings at odds with that holding were, in fact, in concert with it. In every ERISA case relied upon by Petitioners, the court held that the parties must suggest more than one reasonable interpretation of the language, as written, prior to considering extrinsic evidence.[7] None of the cases relied upon by Blue Cross suggests that extrinsic evidence may be used to create an ambiguity in an otherwise unambiguous plan document. Even Blue Cross' petition (at p. 5) acknowledges that extrinsic evidence may be utilized only when "there may be reasonable **multiple interpretations** or **meanings** of that language." (Empha is added.)

In addition, it should be noted that the Appeals Court's decision is consistent with this Court's own holding in *Firestone Tire & Rubber v. Bruch*, 109 S.Ct. 948 (1989). In *Bruch*, this Court held that a fiduciary may

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[7] In addition to the Circuits referenced by Petitioners, the Fourth Circuit also applies the same methodology used by the Sixth Circuit to determine ambiguity. **See**, *Bailey v. Blue Cross & Blue Shield of Virginia*, 67 F.3d 53, 57 (4th Cir. 1995).

only interpret its own documents if that right has been specifically reserved in the text of the document. 109 S.Ct. at 956. Here, Blue Cross attempted to apply a restriction (i.e., that Cardiac Rehab must be specifically listed) which did not appear on the face of the document. In essence, Blue Cross claimed that it should be allowed to interpret its own document, which it had no right to do. Thus, when requiring the District Court to apply the Plan's plain language, instead of Blue Cross' own, contrary interpretation, its holding was consistent with this Court's holding in *Bruch*.

The decision of the Sixth Circuit in this case has not created an anomaly in the otherwise consistent case law governing the identification of ambiguities in ERISA plan documents. Certiorari is unnecessary and improper in this case because the lower court's decision is not in conflict with other Circuits or with holdings of this Court. Accordingly, certiorari should be denied.

II. THIS CASE IS A WHOLLY INAPPROPRIATE VEHICLE FOR ADDRESSING THE ISSUE OF PROPER EXTRINSIC EVIDENCE FOR CONSTRUCTION OF ERISA PLAN DOCUMENTS.

Certiorari is also inappropriate in this case because, notwithstanding Blue Cross' allegations to the contrary, there was no extrinsic evidence available to ascertain the parties' mutual intent as to the meaning of the language in question. The typical ERISA case where a court might be called upon to consider the admissibility of extrinsic evidence would involve reviewing evidence that the parties had actually discussed an issue of coverage beforehand, or that the parties had reached a mutual agreement which was not properly drafted in the final document. But no such evidence was submitted or exists

in this case. The evidence which Blue Cross believes was improperly excluded was unrelated to this contract. There was no evidence of negotiations regarding Cardiac Rehab, as demonstrated by a review of other evidence submitted below:

In early Spring of 1989, Appellant's Employer received a brochure indicating the various Blue Cross Insurance Product Packages available through its membership in "COSE" (the Council of Small Enterprises). *See*, Depo. of Sandra Melley (R 97, Ex. N at p.11), and attached Depo. Ex. "2". Subsequently, Blue Cross sent information about its COSE plans directly to the employer (Dallas Shoe Warehouse – "Dallas").

Prior to selecting the benefits outlined in Appellant's Certificate, Dallas met with a Blue Cross representative (Stip. #5) who outlined Dallas' ability to choose between four "traditional" packages of benefits. The only variations between the packages related to "co-pays," "deductibles" and vision and drug coverage. The packages or "bundles" of covered services were pre-set by Blue Cross. Dallas had no option to add or delete any specific treatment and was not advised that any such option existed. *See*, Depo. of Abraham Weiner (R 97, Ex. O) at 3. Dallas' sole choice for traditional coverages was between pre-packaged products "A", "B", "C", or "D". *See*, R 97, Ex. N, and attached Exs. 1 & 2. For information as to any specific treatments or procedures which were included in the pre-packaged bundle of benefits, Dallas understood it was to consult the Benefit Booklet ("Certificate of Insurance") distributed by Blue Cross to its subscribers. (*See*, R 97, Ex. O (Weiner Depo.) at p. 4.)

Blue Cross acknowledged in the District Court that there was no evidence of negotiations regarding Cardiac Rehab with Respondent, Respondent's group or with anyone else in the class ultimately proposed. **See**, Stip. #'s 6-8; Response No. 11 from Defendants' Answers to Plaintiff's First Set of Interrogatories (Ex. B to R 82). Thus, there was no evidence relevant to establishing the parties' mutual intent on the issue. **See**, **e.g.**, *Bailey v. Blue Cross & Blue Shield of Virginia*, 67 F.3d 53, 57 (4th Cir. 1995) (If the parties had negotiated regarding the Policy's terms, extrinsic evidence concerning their intent might be revealing.). The evidence which Blue Cross attempted to rely upon was an undated contract between it and another group, which was not shown to be related to Respondent's contract. There was no evidence that Respondent was shown this coverage and turned it down. There was no evidence that the issue of Cardiac rehab had ever been discussed. There was no evidence at all when this other plan document was first used or offered to others. There was no evidence suggesting that the plan document which the Sixth Circuit found to be improper was related in any way to the relationship between the parties to this action.

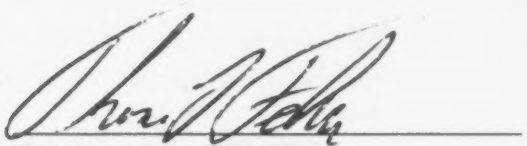
It is apparent that the facts and current procedural setting of this case are unique and do not fit the typical situation where courts are required to analyze or interpret ERISA plan documents. The evidence which Blue Cross sought to rely upon for "interpreting" plans was not of a type which would generally be utilized by a court for that purpose. Thus this case does not present an appropriate opportunity for this Court to address a District Court's proper use of extrinsic evidence in interpreting ERISA plan documents. Accordingly, Certiorari should be denied.

CONCLUSION

The foregoing demonstrates that the decision of the Sixth Circuit is **not** in conflict with the holding of the other Circuits. Indeed, the standard utilized by that Court for determining the existence of an ambiguity is entirely consistent with the standards utilized by all federal courts in ERISA cases. Further, there is an absence of any evidence relevant to the clause in question. Therefore, even if Blue Cross could prevail in its claim that extrinsic evidence can be considered to **create** an ambiguity, it has no relevant evidence to offer, making this case a wholly inappropriate vehicle to address this issue.

Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,



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